Supreme Court, U.S.
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No. 96-781

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES E. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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8 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's perjury conviction after the district court, without objection, decided the issue of materiality itself.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 89 F.3d 854 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1996. A petition for rehearing was denied on August 20, 1996. Pet. App. 3a. The petition for a writ of certiorari was filed on November 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to 60 months' imprisonment, to be followed by three years' supervised release, and was fined $12,000. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. Petitioner testified falsely at the criminal trial of Daniel Levon Hughes and others. At the time of Hughes's trial, petitioner was the Sheriff of Echols County, Georgia. Petitioner was called as a rebuttal witness for the government to refute Hughes's testimony that Hughes had been working with petitioner in a reverse sting operation by law enforcement authorities. Petitioner testified that Hughes had never told him that he was in the marijuana business. Petitioner further testified that Hughes had never mentioned the drug business to him at all before a search of Hughes's residence on January 21, 1993. Gov't C.A. Br. 3-4.

That testimony conflicted with information petitioner had provided to an agent of the Georgia Bureau of Investigation and to an agent of the Georgia Drug Task Force. Georgia Drug Task Force Special Agent Trish Grina testified that she met with petitioner and Hughes, whom petitioner had identified as a confidential informant who had information about marijuana smuggling and trafficking by a family in Jennings, Florida. Hughes gave petitioner and Grina specific information about a load of marijuana, including its current location and planned delivery. Petitioner later told Grina that Hughes had disclosed that

information because he was afraid he had sold marijuana to an undercover agent. Gov't C.A. Br. 3-6.

Special Agent Ronnie Thompson of the Georgia Bureau of Investigation also testified that petitioner had discussed with him his knowledge of Hughes's drug activities. In December 1992, petitioner told Thompson that Hughes had given him information about marijuana smuggling because people who had been providing Hughes with marijuana had begun dealing with someone else. Petitioner further told Thompson that Hughes had told him on several occasions about being in the marijuana business. Gov't C.A. Br. 6-7.

2. At trial, the district court followed then-prevailing law and decided the element of materiality itself. See *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983). Petitioner made no objection to that procedure. Gov't C.A. Br. 16; see also Pet. C.A. Br. 19-20, 31. He did object to the introduction of evidence concerning materiality, and to the portion of the standard Eleventh Circuit jury instructions that advised the jury that the materiality element of the offense had already been decided by the court. He argued that, because materiality was an issue for the court to decide, there was no need to inform the jury of the matter, and that telling the jury that the government had already satisfied one element of the offense could prejudice the defense. See Pet. C.A. Br. 19-20, 31; see also Gov't C.A. Br. 16.

3. After petitioner was convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Constitution requires submission to the jury of the issue of materiality when it is an element of a charged offense. On appeal, petitioner contended that the district court had committed plain error in failing

to submit the issue of materiality to the jury. Pet. C.A. Br. 29-35.

The government argued that, as in *United States* v. *Kramer*, 73 F.3d 1067 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996), petitioner had failed to satisfy the requirements for reversal under plain error review. Because petitioner's false statements were clearly capable of influencing the jury, and because there was no indication that the court's own determination of the materiality issue seriously affected the fairness, integrity, or public reputation of judicial proceedings (see *United States* v. *Olano*, 507 U.S. 725, 736 (1993)), the government urged affirmance of the conviction. Gov't C.A. Br. 15-18. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

DISCUSSION

Petitioner contends (Pet. 8-13) that the court of appeals erred in refusing to reverse his conviction on the ground that the district court failed to submit the issue of materiality to the jury. Conceding (Pet. 7-8) that the court of appeals apparently used plain error analysis to affirm his conviction, he observes (Pet. 10-11) that the circuits are in conflict concerning the appropriate standard of review for *Gaudin*-type errors to which a defendant made no objection at trial. Because that is the issue on which the Court granted certiorari in *Johnson* v. *United States*, No. 96-203 (to be argued Feb. 25, 1997), the Court should hold this petition pending its decision in that case.*

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* Petitioner now claims (Pet. 8-9) that he did object to the district court's jury instructions removing materiality from the jury's consideration, but he admits that the objection might not be considered "precise" and therefore argues in the alternative

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

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JANUARY 1997

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that, if in fact no objection was made, his case should be reviewed along with *Johnson*.

In fact, petitioner did not object to the district court determination that he now challenges in this Court. Petitioner did object to the district court's decision to inform the jurors that the court had decided the issue of materiality. He did not, however, object to the court's failure to submit the materiality issue to the jury. See ~~7 R.~~ 47-49; Pet. C.A. Br. 19-20, 31; Gov't C.A. Br. 16.

3/16/95 Tr.